

PAUL S. PADDA, ESQ. (NV BAR # 10417)
Email: psp@paulpaddalaw.com
MICHAEL A. HUMPHREYS, ESQ. (Admitted PHV)
Email: mah@paulpaddalaw.com

PAUL PADDA LAW
4560 South Decatur Blvd., Suite 300
Las Vegas, Nevada 89103
Tel: (702) 366-1888

-and-
MICHAEL LANIGAN, ESQ. (Admitted PHV)
LAW OFFICE OF MICHAEL LANIGAN
318 East Fourth Street
Waterloo, Iowa 50703
Tele: (319) 236-2064

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ESTATE OF NEKIYLO DEWAYNE
GRAVES, by and through Eureka Graves as
next-of-kin, personal representative and its
Special Administrator SHANNON L.
EVANS; EUREKA GRAVES, an individual,

Plaintiffs,

vs.

NYE COUNTY, NEVADA, a political
subdivision of the State of Nevada; JOHN
KAKAVULIAS, an individual and employee
of Nye County, Nevada; SOC NEVADA,
LLC, a foreign limited liability company
(d/b/a "SOC, LLC"); TRE'QUIS HARRIS,
an individual and employee of SOC Nevada,
LLC; DOES I -X; ROES I-X,

Defendants.

Case No. 2:20-cv-2359-JAD-DJA

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Citing Federal Rules of Civil Procedure 12(b)(1) and (6), Defendants Nye County,

1 Nevada and John Kakavulias seek dismissal¹ of Plaintiffs' First Amended Complaint ("FAC").²
 2 For the reasons set forth in this Opposition brief, the Court should deny Defendants' dispositive
 3 motion.³ As noted by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit")
 4 in another wrongful death case involving a police shooting, "[n]obody likes the game of 'he
 5 said, she said,' but far worse is the game of 'we said, he's dead.'" Cruz v. City of Anaheim, 765
 6 F.3d 1076, 1077 (9th Cir. 2014). Writing for the panel, Chief Judge Alex Kozinski noted,
 7 "[s]adly, this is too often what we face in police shooting cases like this one." Id (summary
 8 judgment should be denied if any reasonable jury could find it more likely than not that Cruz
 9 didn't reach for his waistband). Defendants in this case, like the defendants in Cruz, seek to
 10 have the Court sanitize the actions of the officers that killed Nekiyo Graves by relying upon
 11 one-sided, self-serving and contradictory "evidence."⁴

12 In support of this Opposition, Plaintiffs rely upon the memorandum of points and
 13 authorities below, the documents attached to this filing (Exhibits A and E), all papers on file in
 14 this litigation and any additional arguments the Court may entertain.

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 19 ¹ See ECF No. 54.

20 ² See ECF No. 35.

21 ³ Plaintiffs note that the motion to dismiss is filed on behalf of only two of the four defendants:
 22 Nye County Nevada and John Kakavulias.

23 ⁴ Worse yet, Defendants rely upon unauthenticated documents (including photographs) in
 24 support of their motion to dismiss. The Ninth Circuit has repeatedly stated a court may not rely
 25 upon unauthenticated documents in granting summary judgment. See Orr v. Bank of America
 26 NT & SA, 285 F.3d 764 (2002). Should defense counsel seek to fix this deficiency at the Reply
 brief stage (when Plaintiffs cannot challenge any declaration supplied by Defendants), the Court
 should reject such an effort.

MEMORANDUM OF POINTS AND AUTHORITIES**I.****INTRODUCTION****A. THE PARTIES**

The Plaintiffs in this “1983 action” are Eureka Graves, the mother and personal representative of Nekiyllo DeWayne Graves (“Nekiyllo”)⁵ the young man whose death gives rise to the claims and demand for damages made in the FAC. Ms. Graves sues both in her individual capacity and as the personal representative of her son’s estate (as administered by Shannon L. Evans). The Defendants are: Nye County (“Nye County”), a political subdivision of the state of Nevada; John Kakavulias (“Kakavulias”) employed by Nye County as a deputy sheriff; SOC Nevada, LLC (“SOC”) a corporate entity contractually tasked with providing security services to the Nevada National Security Site (“NNSS”) and Tre’quis Harris (“Harris”) who is employed by SOC as a security police officer.

There is no dispute regarding the employment relationship between the Nye County Sheriff’s office and Kakavulias; as well as the employment relationship between SOC and Harris. Similarly, there is no dispute that on January 28, 2019, both Kakavulias and Harris fired rifle rounds that killed Nekiyllo.

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⁵ Throughout this brief we refer to the decedent by his given name, “Nekiyllo,” rather than his surname to avoid confusion with Eureka Graves, Nekiyllo’s mother who is a named Plaintiff.

B. THE ALLEGATIONS OF THE FAC

The Plaintiffs filed their FAC on December 2, 2021. That FAC alleges that on January 28, 2019, Kakavulias and Harris, acting in their official capacities as employees of the Nye County Sheriff's Office and SOC, respectively, shot and killed Nekiyo in violation of 42 U.S.C. § 1983 and the Fourth Amendment to the Constitution, while simultaneously committing various other Nevada common-law offenses, described in greater detail below.

During the early evening hours of January 28, 2019, Nekiyo approached gate 100 of the NNSS by car. The NNSS, located approximately 65 miles northwest of Las Vegas, is a secure government installation, maintained and managed by the United States Department of Energy. One of the primary missions of NNSS is to assure the safety and security of the nation's nuclear arsenal. While there is no dispute that NNSS is a secure government facility, management of the facility allowed public visitation within its boundaries prior to the scourge of the global pandemic.

Public vehicular access to the facility is controlled by a gate staffed by armed SOC officers. By all accounts, Nekiyo drove up to the gate in a non-threatening manner, brought the car to a complete stop, and engaged the gate officers in a brief conversation that was ordinary in tone and substance. Nekiyo told the officers that he was low on fuel and asked them where he might locate a nearby gas station. Officers at the gate approached Nekiyo's car, looked inside and confirmed that his fuel display indicated that the tank was nearly empty. During the inspection, the officers saw no weapons inside Nekiyo's car. The officers brusquely told Nekiyo that there was no gas station in the vicinity and that he would have to travel to Indian

1 Springs, about twenty miles away, to purchase fuel. It is unlikely, given the officers'
2 acknowledgment that Nekiyo's car was already low on fuel, that the car would have been able
3 to reach Indian Springs before running dry.

4 Next, according to the Defendants' account, Nekiyo briefly feigned compliance by
5 backing his car up; but then passed through the gate and drove down the access road toward the
6 NNSS facility. Defendant Harris immediately gave chase in his service vehicle followed by an
7 unspecified number of other SOC officers in vehicles.

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9 At some point, Nevada deputy sheriff Kakavulias, who was at his office, learned of a
10 suspected gate-runner at the NNSS. Kakavulias immediately departed in his sheriff's vehicle
11 intent on joining the pursuit of Nekiyo's car. Not only did Kakavulias join the pursuit, but he
12 eventually became the lead chase car. Eventually Nekiyo rolled his car to a normal stop on the
13 side of the road and briefly exited the vehicle. The light bar on Kakavulias's lead car was
14 broken, so Nekiyo may or may not have known who, near sunset, was following him on the
15 isolated desert road.⁶ Nekiyo, exited his vehicle frantically waving, what one witness
16 described as empty hands, after Kakavulias shot out Nekiyo's rear, driver's-side tire. Nekiyo
17 re-entered his partially disabled car and slowly drove away. As Nekiyo drove the hobbled car
18 away the cadre of motorized officers, including Kakavulias, resumed their group pursuit of
19 Nekiyo's car until a short distance later, Nekiyo's car came to a permanent stop.

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22 According to the police narrative, once Nekiyo's car came to a voluntary stop, the
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26 ⁶ According to the website suntoday.org, on January 28, 2019, the sunset in the Las Vegas
vicinity occurred at approximately 5:04 p.m.

second and last time, and only a short distance from the first stop, he got out and walked back toward the police officers in a non-threatening manner. Kakavulias, who was apparently closest to Nekiyo, claims that he repeatedly urged Nekiyo to get on the ground and/or to show his hands. According to the police, Nekiyo did neither, choosing instead, in the face of logic, to walk toward the officers in a non-threatening manner but with his hands concealed from view. When Nekiyo was within six to eight feet of Kakavulias, Kakavulias and Harris fired their service rifles mortally wounding Nekiyo. Kakavulias did not use his less lethal taser to subdue Nekiyo because he (Kakavulias) had left his taser behind at the station.

In the immediate aftermath of Nekiyo's killing, there was a bladed brass knuckle positioned next to his body, but no firearm.

C. PLAINTIFFS' CLAIMS FOR RELIEF

Nekiyo Graves's death was a preventable and unnecessary tragedy that can be traced directly to the Defendants' behavior that breached both the Plaintiffs' Constitutional and common-law rights.

Count one, the primary charge of the FAC, alleges that the Defendants violated the Plaintiffs' Fourth Amendment by administering deadly force on Nekiyo Graves that was excessive and unnecessary. The Fourth Amendment entitles a person to be free from unreasonable seizures which includes freedom from the use of unreasonable force that causes injury or death. "[A] claim of 'excessive force in the course of making [a] ...'seizure' of [the] person ... [is] properly analyzed under the **Fourth Amendment's** 'objective reasonableness' standard.'" Graham v. Connor, 490 U.S. 386, 388 (1989) (emphasis supplied). In this case,

1 Kakavulias and Harris's joint actions in shooting Nekiyllo dead was unjustified based upon the
2 given facts.

3 Count two of the FAC assigns municipal liability to Nye County because it ratified
4 Kakavulias actions as a matter of policy. Count three alleges that Nye County is additionally
5 liable because of its failure to train its deputies in a manner that would prevent injury or (in this
6 case) death. Count four alleges that both Kakavulias and Harris, police officers employed by
7 Nye County and SOC, respectively, acted pursuant to a policy, practice or custom whose
8 implementation led to Nekiyllo's death. Count five charges all Defendants with substantive due
9 process violations embodied in the Fourteenth Amendment that deprived Nekiyllo of life and
10 liberty. Count six through ten allege common-law offenses, including negligence, battery,
11 intentional infliction of emotional defense and conspiracy against various Defendants.

14 II.

15 ARGUMENT

16 A. THE LEGAL STANDARD

17 1. Federal Rule Of Civil Procedure 12

18 "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency
19 of the complaint." N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). The
20 Supreme Court has ruled that to survive a motion to dismiss a plaintiff's complaint need only
21 present "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp.
22 v. Twombly, 550 U.S. 544, 570 (2007); *See also* Cohill v. Ocwen Loan Servicing, LLC, 845 F.
23 App'x 688, 689 (9th Cir. 2021) (to avoid a dismissal motion grounded in a Rule 12(b)(6)

1 motion, a complaint need only contain sufficient factual matter, accepted as true, to state a
2 claim to relief that is plausible on its face.)

3 In ruling upon a motion to dismiss under Rule 12(b)(6), the court analyzes the
4 complaint and takes “all allegations of material fact as true and construe[s] them in the light
5 most favorable to the non-moving party.” Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484
6 (9th Cir. 1995) *see also* Goldstein v. City of Long Beach, 715 F.3d 750, 753 (9th Cir. 2013). In
7 addition, according to a recent holding in Ernst and Hasse Management Company, Inc., v.
8 Hiscox, Inc., 2022 WL 223965 (9th Cir., January 26, 2022) “dismissal is [appropriate] only if it
9 appears beyond doubt that [the] plaintiff can prove no set of facts in support of its claims which
10 would entitle it to relief (citation omitted). Finally, and perhaps most authoritatively, “it is
11 axiomatic that the motion to dismiss ... is viewed with disfavor and is rarely granted.”
12 McDougal v. County. of Imperial, 942 F.2d 668, 676 n.7 (9th Cir. 1991).

15 Similarly, pursuant to Rule 12(b)(1), which challenges the subject matter jurisdiction of
16 the court, a judge must accept as true all facts alleged in the complaint and construe them in the
17 light most favorable to plaintiff, the non-moving party. “Dismissal is improper unless it appears
18 beyond doubt that plaintiff can prove no set of facts in support of his claim which
19 would entitle him to relief.” Davinci Aircraft, Inc., v. United States, 926 F.3d 1117, 1122 (9th
20 Cir. 2019).

22 2. Section 1983 And The Doctrine Of Qualified Immunity

23 Federal statute 42 U.S.C. § 1983⁷ provides a cause of action against any person who,
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26 ⁷ The applicable portion of the statute reads as follows: “Every person who, under color of any
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under color of state law, deprives another of rights secured by the Constitution. Wyatt v. Cole, 504 U.S. 158, 161 (1992) The Supreme Court has ruled that “[m]unicipalities and other local government units,” such as counties, are included within the statute’s broad reach. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978).

The Supreme Court has also recognized the comprehensive, remedial powers inherent in the statute:

A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of “any rights, privileges, or immunities secured by the Constitution and laws.” (emphasis added.) Accordingly, we have “repeatedly held that the coverage of [§ 1983] must be broadly construed.” *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989). The legislative history of the section also stresses that as a remedial statute, it should be “‘liberally and beneficently construed.’” *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684, 98 S.Ct. 2018, 2032, 56 L.Ed.2d 611 (1978) (quoting Rep. Shellabarger, Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871)).

As respondents argue, the “prime focus” of § 1983 and related provisions was to ensure “a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto,” *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 611, 99 S.Ct. 1905, 1913, 60 L.Ed.2d 508 (1979), but the Court has never restricted the section’s scope to the effectuation of that goal. Rather, we have given full effect to its broad language, recognizing that § 1983 “provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.” *Monell, supra*, 436 U.S., at 700–701, 98 S.Ct., at 2041. Thus, for example, we have refused to limit the phrase “and laws” in § 1983 to civil rights or equal protection laws. See *Maine v. Thiboutot*, 448 U.S. 1, 4, 6–8, 100 S.Ct. 2502, 2504, 2505–2506, 65 L.Ed.2d 555 (1980).

statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]”

1 Dennis v. Higgins, 498 U.S. 439, 443–45 (1991)

2 Section 1983 has been used to rectify a host of constitutional transgressions committed
3
4 by state actors, including: first amendment abridgements (O'hare Truck Service, Inc., v. City of
5 Northlake, 518 U.S. 712 (1996)); freedom from cruel and unusual punishment (Jordan v.
6 Fitzharris, 257 F. Supp. 674, 679 (N.D. Calif. 1966)); and equal protection, Shqairat v. U.S.
7 Airways Group, Inc., 645 F. Supp. 2d 765 (D. Minn. 2009)). However, its most common
8 application, as is the case here, is in vindicating the rights of citizens who have been deprived of
9 their Fourth Amendment rights to be free from unreasonable searches and seizures. Graham v.
10 Connor, 490 U.S. 386 (1989)(claims that law enforcement officials used excessive force in the
11 course of making an arrest, investigatory stop or seizure of a person “are properly analyzed
12 under the Fourth Amendment's “objective reasonableness” standard.” Id at 388.

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14 The doctrine of qualified immunity, on the other hand, is a limited waiver of liability for
15 state actors who inflict physical harm or who commit other Constitutional transgressions.
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17 Harlow v. Fitzgerald, 457 U.S. 800 (1982) is the seminal case that established qualified
18 immunity as a defense/response to law enforcement impropriety.⁸ According to Samuelson v.
19 Oregon State University, 162 F. Supp. 3d 1123 (D. Oregon 2016) “[t]he doctrine shields
20 government officials performing discretionary functions from liability for damages ‘insofar as
21 their conduct does not violate clearly established statutory or constitutional rights of which a
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25 ⁸ Although Harlow sounded in “*Bivens*” in that it was a constitutional action alleging misdeeds
26 by a federal official, in Davis v. Scherer, 468 U.S. 183 (1984) the Court applied the standard of
27 “objective reasonableness” within the context of a §1983 action.

reasonable person would have known.” Dunn v. Castro, 621 F.3d 1196, 1198–99 (9th Cir.2010) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982)).

In determining if an official is entitled to qualified immunity, courts look at two issues; (1) whether the plaintiff alleged facts establishing the violation of a constitutional right; and (2) “whether the right is clearly established such that a reasonable government official would have known that ‘his conduct was unlawful in the situation he confronted.’” Samuelson, *supra* at 1135.

Thus, while police officers may, on probable cause, arrest and detain individuals based upon that probable cause, they must do so in a manner that coincides with and is proportional to the gravity of the circumstance giving rise to the reason for detention. In this case, the Plaintiffs, through the allegations of their amended complaint, contend that the police used excessive force in causing Nekiyo Graves’s needless death. As such, this Court should evaluate the Defendants’ behavior in seizing (*i.e.*, killing) Nekiyo through the lens of the Fourth Amendment reasonableness standard. The United States Supreme Court, in Graham v. Connor, 490 U.S. 386, 394 (1989), picked up this thread when it ruled that “[w]here, as here, the excessive force claim arises in the context of an arrest or investigatory stop, it is properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons ... against unreasonable ... seizures’ of the person. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized “excessive force” standard.” *See also Tennessee v. Garner*, 471 U.S. 1, 7 (1985)(“[T]here can be no question that

1 apprehension by the use of deadly force is a seizure subject to the reasonableness requirement
 2 of the Fourth Amendment.”). Finally in evaluating the Defendant’s conduct the court must
 3 apply a standard of “objective reasonableness.” Graham v. Connor, 390 U.S. 386, 388 (1989);
 4 *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

5 Common sense dictates that whether and to what extent the application of force is
 6 “reasonable” is determined on a case-by-case basis. “The test of reasonableness under the
 7 Fourth Amendment is not capable of precise definition or mechanical application,” Bell v.
 8 Wolfish, 441 U.S. 520, 559, (1979), however, its proper application requires careful attention to
 9 the facts and circumstances of each particular case, including the severity of the crime at issue,
 10 whether the suspect poses an immediate threat to the safety of the officers or others, and
 11 whether he is actively resisting arrest or attempting to evade arrest by flight.” *See* Graham,
 12 *supra* at 396.

13 Thus, based upon the foregoing, the central issue before the Court is the following:
 14 Were the actions of the *in personam* defendants, Kakvulias and Harris, in killing Nekiyllo
 15 Graves “objectively reasonable” within the context of Fourth Amendment law under the
 16 circumstances of this case?
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 20 **B. THE DEFENDANTS’ FACT-BASED RELIANCE UPON QUALIFIED**
 21 **IMMUNITY LACKS SUBSTANCE AND IS BASED UPON ERRANT**
 22 **AND INCOMPLETE ASSERTIONS**

23 A central, if not defining, element in determining whether the shooters were justified in
 24 killing Nekiyllo is whether their actions were “objectively reasonable.” In other words, did
 25 Nekiyllo pose a threat in the moments leading up to the shooting, which created an objective
 26

1 imperative for the officers to kill him? Or, as posited by the Ninth Circuit in Cruz, could a
 2 reasonable jury find that Nekiyo posed no danger to the officers.

3 In describing the circumstances that triggered the shooters' mindset to shoot, the
 4 Defendants rely almost exclusively on the unsworn, hearsay statements contained in the "Report
 5 of Investigation" prepared by the Nevada Department of Public Safety, attached to the
 6 Defendants' motion as Exhibit No. 2, and identified in the Defendants' motion as the "NDI"
 7 report. That May 16, 2019, report (completed nearly four months after Nekiyo's killing) was
 8 compiled and completed solely by members of the law enforcement community.⁹ The report,
 9 itself, is evidentially questionable, if not outright unreliable, because it is composed of multiple
 10 levels of hearsay. For example, the document itself is hearsay, but it also contains the
 11 statements of third parties such as other officers (double hearsay); as well as the statements of
 12 witnesses who report what they heard other witnesses say (*i.e.*, hearsay thrice removed).
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14 A critical section of that report, entitled "Incident Summary" provides an unsworn
 15 narrative of the events of what happened that day; from Nekiyo peacefully driving up to the
 16 entry gate 100, to officers handcuffing his corpse after he had been killed. Aside from virtually
 17 all the statements in the full report, and specifically, the "Incident Summary" being unsworn,
 18 hearsay (and in many instances, double and triple hearsay) there is no attribution to any person
 19 regarding any of the statements in the report. Even the actions of Kakavulius and Harris,
 20 described on pp. 11-12, respectively, of the report are offered in a third-person narration with no
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 25 ⁹ On information and belief, the Nevada Department of Public Safety is the umbrella
 26 organization of the Nevada State Police Department tasked with conducting investigations of
 officer involved shootings of other law enforcement organizations within Nevada.

1 direct statements attributed to either Kakavulius or Harris.¹⁰ In multiple sections and sentences
 2 throughout the NDI report, the Defendants return to the unattributed, hearsay assertions that the
 3 officers could not see Nekiyo's hands which led to their decision to fire: "At no time did any
 4 officer see Graves' hands" (p. 9, referencing the first stop); and "he had his hand behind his
 5 back" [and in the following sentence of the report] "Graves continued walking leisurely toward
 6 the officers with his hands behind his back" (p. 9, referencing the second stop).

8 Based on the unattributed unsworn, hearsay narratives contained in the NDI, the
 9 Defendants' brief redundantly states that: Nekiyo failed to comply with commands to "show
 10 me your hands"; and "that his hands [] were intentionally kept hidden behind his
 11 back."¹¹ (Defendants' motion p. 6, lines 10-11); "he kept his hands hidden behind his back"
 12 (Defendants' motion p. 6, lines 20, 25); [Nekiyo] ignored "the commands of armed law
 13 enforcement . . . intentionally hiding his hands (Defendants' brief p. 14, lines 10-11; "according
 14 to the NDI Report, "at no time could the officers see [Nekiyo's] hands" (Defendants' motion
 15 p. 14, lines 12-13); "[Nekiyo] continued to walk towards the officers with the contents of his
 16 hands hidden" (Defendants' motion p. 14, lines 14-15); "the officers never saw [Nekiyo's]
 17 hands before they fired" (p. 16, lines 9-10); "[Nekiyo failed] to show his hands while he
 18 walked toward armed officers" (p. 16, lines 20-21). Thus, from the frequent references to
 19 Nekiyo's "hands" throughout their brief, the Defendants are obviously intent on conveying the
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 24 ¹⁰ Pagination refers to that District Court documentation at the top of each page.

25 ¹¹ Besides being hearsay, that is also an overstatement of the *verbatim* wording in the report.
 26 The report only states that Nekiyo's hands were behind his back; it never declares Nekiyo's
 state of mind that he "intentionally" hid his hands behind his back.

1 impression to this Court that the shooters were justified in killing Nekiyo based on the mere
2 fact that they could not see his hands.

3 But there are numerous legal deficiencies and factual gaps in the Defendants' claim that
4 the shooters could not see Nekiyo's hands. First as a matter of law, the party that sponsors a
5 motion to dismiss must accept "as true" all allegations contained in the complaint. Ashcroft v.
6 Iqbal, 556 U.S. 662, 678 (2009); Armstrong v. Reynolds, 2022 WL 121873 (9th Cir., January
7 13, 2022); *see also* Goldstein v. City of Long Beach, 715 F.3d 750, 753 (9th Cir. 2013); and
8 Hendon v. Geico Insurance Agency, 377 F. Supp. 1194, 1196 (D. Nev. 2019). In this case, the
9 Plaintiffs' FAC unambiguously states at page 19, lines 14-15 that "a witness an NNSS
10 employee at or near the scene, R.M., reporting seeing "a man walking normal toward the
11 officers . . . hands were at his sides" visible." Thus, based on the mandate of Iqbal and its
12 progeny, the defendants cannot use the processes of Rule 12 to litigate the facts in the Plaintiffs'
13 FAC.

14 Yet the Defendants' efforts to alter the facts in disregard of the above-referenced limits
15 imposed by Rule 12, (especially those focused on what, if anything, Nekiyo had in his hands)
16 doggedly persist throughout their brief. Most prominently, the Defendants devote two pages of
17 their motion analyzing the statement¹² of Rachelle McDonald, an NNSS employee, who
18 observed a considerable and crucial portion of the police confrontation with Nekiyo. She, in
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24 ¹² The use of the word "statement" instead of testimony is intentional. While police
25 investigators interviewed Ms. McDonald, recorded her statement, and reduced that statement to
26 a written transcript, her remarks were not under oath. Nor were they tested by the crucible of
cross-examination.

fact, saw the officers shoot Nekiyo dead. During her interview, reduced to a transcript and attached to the Defendants' brief as Exhibit 3, the police investigator asked Ms. McDonald, who laid a foundation as an eyewitness to Nekiyo's killing, questions about the circumstances of the shooting. At one point during the interrogation, the investigator asked Ms. McDonald about the placement of Nekiyo's hands during the encounter. She initially stated that she was unaware of his hands. (Exh. 3, p. 7, line 8). She then quickly refines her answer by stating that his hands were positioned "normal[ly]" on the side." (p. 7, lines 11-12). The police interrogator quickly followed up by asking Ms. McDonald if she is sure about the placement of Nekiyo's hands on his side before he was shot; and she acquiesces by stating, "I don't know for sure so . . ." It is then, before she can complete her answer, that the interrogator cuts her off and immediately begins to question her about another subject. This type of selective solicitation of facts suggests a pre-ordained outcome to suit the interrogator's aims in the interview. A lawyer who represented the counter-vailing interests of law enforcement might have elicited a more fulsome exploration of Ms. McDonald's perception than was afforded her by the police interrogator. This type of one-sided interview underscores the need for more open, complete and unbiased discovery in this case.

In addition to Ms. McDonald's statement, another witness offered an unsworn statement that at another stage during the encounter, he saw Nekiyo emerge from the car "erratically waving his hands in the air." *See* Exhibit A. Chris Rivers, an uninterested witness, who offered a statement to the FBI on February 4, 2019, said he saw, what is logical to conclude was the

1 first time that Nekiyo stopped his car in compliance with the police pursuit.¹³ Rivers said that
 2 while Nekiyo was angrily waving his hands in the air—after the officers at shot out his tire—
 3 "he (Rivers) did not see anything in [Nekiyo's] hands." Exhibit A.

4 But the Defendants reassembling of the facts do not stop there. For example, consider
 5 the Defendants' contention that Nekiyo uttered a contemptuous challenge to authority at the
 6 gate entrance by stating "What if I don't[!]" before going through the gate. We offer two points
 7 on this flawed contention. First, the statement is not attributed to any person, making it
 8 irredeemable hearsay. Collaterally, it does not appear that either of the *in personam* Defendants
 9 ever heard this utterance. Indeed, Kakavulius could not have heard the statement because it is
 10 undisputed that he was not at the gate when the statement was purportedly uttered by Nekiyo.
 11 Furthermore, when the FBI interviewed Harris a week after Nekiyo's death he (Harris) did not
 12 state or suggest that he directly heard anything that Nekiyo said at the gate.

15 Second, although the Defendants' motion punctuates Nekiyo's statement with an
 16 exclamation point, indicating a type of aggressive, excited utterance, no such punctuation is
 17 present in the Incident report. *See Incident Report*. p. 8. This exaggeration, indeed
 18 misrepresentation, mischaracterizes Nekiyo's tone and attitude; especially when it is
 19 undisputed that discussions with Nekiyo up to that point were conversational. *See FBI report of*
 20 *SPO Tyler Jones*, who stated in his February 20, 2019, interview stated that "[w]hen the suspect
 21 pulled up to the gate, he was speaking coherently and normally. Exhibit B. The suspect was
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25 ¹³ "Logical" because Rivers saw Nekiyo re-enter his car and drive away. So this could not have
 26 been the occasion when the police shot Nekiyo dead a few minutes later at the scene of the
 27 second stop, as witnessed by Ms. McDonald.

1 calm and it was believed he actually wanted to find a gas station. The suspect's dash lights for
 2 low fuel were lit up and the suspect stated he needed gas." *See also the February 20, 2019, FBI*
 3 *report of Joseph Thurman*, who stated that "[t]he suspect was communicating and listening to
 4 the officers."

5
 6 Next on page 12 of their motion, Defendants attempt to artificially bolster Kakavulius's
 7 credibility that he had special knowledge of and sensitivity to--and that he was, therefore, acting
 8 in accordance with--enhanced law enforcement prerogatives on the premises of the NNSS by
 9 virtue of a federal contract; stating that Kakavulius was "necessarily aware of these high
 10 security implications as he was present on the NNSS grounds to provide law enforcement and
 11 security services pursuant to a federal contract between DOE and the county." (emphasis
 12 added). On page 13 of their motion, the Defendants reiterate Kakavulius's alleged "super cop"
 13 status, by virtue of federal contract entitlements, when they state that "as a security officer
 14 subject to federal contract . . . it is obvious any reasonable officer would understand that in
 15 addition to maintaining the peace, his actions were protecting this nation's security and nuclear
 16 operations."
 17

18
 19 That claim has several flaws. First, it is sheer speculation that Kakavulius had a
 20 heightened sense of awareness regarding the operations of the NNSS; or that he had a
 21 familiarity with the differences, nuances and enhanced security concerns, if any, of law
 22 enforcement on the NNSS compound; and aside from Defendants' conclusory statements on
 23 that point, referenced above, nothing in their brief supports that claim. Second, the Defendants
 24 state that Kakavulius was acting within federal contract provisions when he undertook law
 25

1 enforcement activities and initiatives that led to his killing Nekiyo. And they purport to attach
 2 the contract to their brief that validates this special, unique law enforcement coalition between
 3 Nye County and the federal government. Except the document that they attach as Exhibit No. 2
 4 is not a contract at all that would enable this Court to verify the terms of a special law
 5 enforcement relationship between Nye county and the Department of Energy. Instead, it is
 6 nothing more than a two-page invoice that purportedly signifies some kind of unknown
 7 arrangement between the federal government and Nye County. Aside from being an
 8 uncorroborated, unverified hearsay assertion, this invoice proves nothing about Kakavulius's
 9 awareness of "high security implications" inherent on NNSS property; and, with all due respect
 10 to the Defendants, it is nothing less than a sham for them to suggest otherwise to this Court. Of
 11 course, being able to depose Kakavulias, under oath, about what he did, or did not do during the
 12 course of this incident; and what he knew or did not know regarding enhanced security
 13 measures on the NNSS site would bring clarity to both his actions and intent.

14
 15
 16 In another circumstance of questionable justification to kill Nekiyo, the Defendants
 17 concede that although the shooters did not announce themselves as law enforcement officers, at
 18 the crucial scene of Nekiyo's shooting, the fact of law enforcement presence "would be
 19 obvious to any reasonable person." (Defendant's motion, p. 4). But three facts belie that claim.
 20 First, by his own admission, Kakavulius was in an unmarked car. (See interview transcription of
 21 John Kakavulius, dated March 3, 2019, attached hereto as Plaintiff's Exhibit D). Second, the
 22 light bar attached to Kakavulius's unmarked car broke and was not functioning as a signal that
 23 the occupant of the unmarked car was law enforcement. *Id.* Third, in addition to not verbally
 24
 25
 26

1 identifying themselves as police officers, Kakavulius acknowledged that at the time and place
 2 of the second stop (when he and Harris both shot and killed Nekiyo) he was crouched and
 3 concealed behind the “A frame” of the open door of his service vehicle. *See transcript of*
 4 *Kakavulias interview*, (attached hereto as Exhibit D). Thus, Kakavulias’s identity, and
 5 collaterally, his status as a police officer based on his uniform, was concealed from Nekiyo’s
 6 view. In other words, given the Kakavulias’s unmarked car, his non-functioning light bar and
 7 his concealment behind the door during his confrontation with Nekiyo, it is plausible that
 8 Nekiyo had no idea who was pursuing him or why.
 9

10
 11 **C. THE DEFENDANTS’ INACCURATE AND INCOMPLETE**
 12 **REPRESENTATIONS UNDERScore THE NEED FOR DISCOVERY**
 13 **BEFORE THIS COURT CAN MAKE AN INFORMED DECISION**
 14 **REGARDING THE DRASTIC SANCTION OF DISMISSAL**

15 Based on the holding of Graham v. Conner, *supra* and its progeny, the Plaintiffs fully
 16 understand and appreciate the relevance of “objective reasonableness” in determining whether
 17 qualified immunity is appropriate within a given fact pattern. But, whereas here, the
 18 Defendants have conspicuously undermined the validity of their contention that “objective
 19 reasonableness” exist because of their inaccurate and incomplete submissions, the fact-finding
 20 function, through discovery, must be engaged as a foundational basis for this Court to make a
 21 fully informed decision regarding the applicability of “objective unreasonableness.”

22 The Defendants have already laid the groundwork for this process to begin by basing
 23 their motion to dismiss (in large part, if not exclusively) on matters outside the pleadings. To
 24 wit, as demonstrated above, the NDI report, Ms. McDonald’s transcribed, but unsworn,
 25 statement, the uncorroborated invoice, all of them hearsay submissions, form the centerpiece of
 26

1 the Defendants' claim that Kakavulias, and by extension, Nye County, should enjoy qualified
 2 immunity because they have established "objective unreasonable" to justify the taking of
 3 Nekiyo's life.

4 No, they have not. As shown above, the Defendants have offered this Court nothing
 5 more than a porously flawed patchwork of sketchy and outright inaccurate claims that do not,
 6 and cannot, withstand even a *prima facie* consideration of "objective unreasonableness" let
 7 alone the type of scrutiny that two-party discovery would engender.

8 It is a mandatory tenet of Rule 12 litigation, that when matters outside the pleadings are
 9 presented, "the motion **must be** treated as one for summary judgment under Rule 56." Fed. R.,
 10 Civ. P., 12(d)(emphasis added).¹⁴ See also Schmidt v. Contra Costa County, 310 F. Appx. 110
 11

12
 13
 14 ¹⁴ The defendants' assertion that the NDI and Ms. McDonald's transcribed, unsworn statement
 15 should be accepted by this court as "public documents," obviating the requirement that their
 16 motion to dismiss be converted to a motion for summary judgment, is a canard. Neither the
 17 NDI report nor Ms. McDonald's statement were prepared in the ordinary course of
 18 governmental affairs, such as would be a driver's license application, a tax return or a routine
 19 and periodic Treasury Department report tracking the tide of inflation trends. Instead, the
 20 Defendants' exhibits are ALL one-time and unique submissions prepared as an antecedent to
 21 possible, if not probable, litigation. The cases that the Defendants cite in support of their
 22 "public document" have no merit. For example, Shetty v. Lewis, 704 Fed. Appx. 687 (9th Cir.
 23 2017) dealt with "bankruptcy court documents" and other undisclosed public records) In Cirino
 24 v. Ocwen Loan Servicing, LLC, 815 Fed. Appx. 204 (9th Cir. 2020), the court cited the "public
 25 document" exception as *obiter dicta*, and did not specify what document was being relied on in
 26 that case. Finally, the Defendants' reliance on Lasko v. Caliber Home Loans, Inc., 2020 WL
 5803940 (D. Nev. Sept. 29, 2020) is misleading at best. The Defendants cite Lasko for the
 proposition that "the Court may take judicial notice of the Defendants Exhibits which are
 documents of public record without converting Motion to Dismiss into one for summary
 judgment based on FRE 201." In fact, the opinion says nothing at all about accepting the
 specific "Defendants Exhibits" as public reports. Indeed, the opinion does not specify at all
 what the referenced documents are or whether they were submitted by the plaintiff or the
 defendants; although the opinion does seem to suggest that the referenced documents may be
 mortgage documents or bankruptcy records.

(9th Cir. 2009)(“The district court improperly reviewed and relied on matters outside the pleadings in deciding the defendants’ 12(b)(6) motions. See FRCP 12(d) (“If, on a motion under Rule 12(b)(6) ..., matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” *Id.* at 110).¹⁵

III.

CONCLUSION

The law is unambiguous: a motion to dismiss “is viewed with disfavor and is rarely granted.” McDougal v. County. of Imperial, 942 F.2d 668, 676 n.7 (9th Cir. 1991). And yet, the Defendants in this case urge this Court to, literally and figuratively, dismiss Nekiyllo’s life, death and legal claims with a stroke of the pen by sanitizing their actions as “objectively reasonable.” However, as categorically demonstrated above, the Defendants’ quest for qualified immunity, based on a claim of “objective reasonableness,” is built on a proverbial house of

¹⁵ To the extent that defendant Nye County bases its defense on collateral attachment to defendant Kakavulias’s claim of qualified immunity, *see Defendants’ motion, p. 18-19*, that governmental claim must, as shown above, also fail. Finally, Defendants’ claim that they are exempt from liability because of their contractual relationship with the federal government is, similarly, fallow. The Defendants are quick to embrace the alleged government contract as a shield to liability. (“Here, Nye County and its employees were operating under a contract with the Department of Energy to provide law enforcement as well as other services.” *Id.* at p. 20; “Therefore [Kakavulias] acted within the scope of a validly-conferred government contract in compliance with all federal directives.” *Id.* at p. 23.). And yet the Defendants have, curiously and conspicuously, failed to attach a copy of that contract so this Court can assess whether their claims of derivative discretionary function entitlements, via a federal government contract, are valid. These glaring evidentiary omissions, amongst others highlighted in this brief, only underscore, once again, the need for full and unfettered discovery as a necessary antecedent to what the Defendants erroneously aspire to be a Rule 12(b) motion to dismiss; but what is, in fact and law, a Rule 56 motion for summary judgment.

1 cards. As noted by the Ninth Circuit, “in the deadly force context, we cannot ‘simply accept
 2 what may be a self-serving account by a police officer.” Cruz v. City of Anaheim, 765 F.3d
 3 1076, 1079 (9th Cir. 2014) (*quoting* Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).
 4 “Because the person most likely to rebut the officers’ version of events – the one killed – can’t
 5 testify, ‘[t]he judge must carefully examine all the evidence in the record . . . to determine
 6 whether the officers’ story is internally consistent and consistent with other known facts.’” Id.
 7 This includes “circumstantial evidence that, if believed, would tend to discredit the police
 8 officer’s story.” Scott, 39 F.3d at 915.

10 For all the reasons stated above, including taking into consideration the exaggerations,
 11 misrepresentations and inconsistencies in the so-called “evidence” relied upon by Defendants,
 12 the Court should deny their motion to dismiss.

14 Respectfully submitted,

15 /s/ Paul S. Padda

16 /s/ Michael A. Humphreys

17 _____
 18 Paul S. Padda, Esq.

19 Michael A. Humphreys, Esq.

20 *Attorneys for Plaintiffs*

21 Dated: February 11, 2022

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure, the undersigned hereby certifies that on this day, February 11, 2022, a copy of the foregoing document entitled **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was served via the Court's electronic filing system, CM/ECF, upon all parties of record and their counsel.

/s/ Paul S. Padda

Paul S. Padda, Esq.
PAUL PADDA LAW

PAUL PADDA LAW, PLLC
4560 South Decatur Blvd., Suite 300
Las Vegas, Nevada 89103
Tele: (702) 366-1888 • Fax (702) 366-1940
www.paulpaddalaw.com

EXHIBIT A

EXHIBIT A



FEDERAL BUREAU OF INVESTIGATION

Date of entry 02/04/2019

CHRIS RIVERS, telephone number [REDACTED], date of birth [REDACTED] /1965, was interviewed at the Federal Bureau of Investigation's Las Vegas Division, located at 1787 W. Lake Mead Blvd., Las Vegas, Nevada. After being advised of the identity of the interviewing Agents, SA Sean Schaerrer and SA Blake Vogt, and the nature of the interview, RIVERS provided the following information:

RIVERS, an MSTs contracted Deputy Facility Manager at the Nevada National Security Site (NNSS), was driving westbound on Mercury Highway at approximately 5:05PM on 01/28/19, when he noticed several emergency lights ahead of him, which he suspected to be from some kind of accident. RIVERS was driving home in his Dodge Ram 1500 truck with RANDY BARKSDALE, telephone number 702-696-8148, and JERRY FRETER, telephone number 702-340-6807, as passengers. As RIVERS got closer he noticed 4-5 vehicles stopped on the other side of the road, about 25 feet away from him, and facing the opposite direction. As he pulled to the shoulder of the road RIVERS heard a single "pop", which he thought was his tire popping or maybe a gun shot, he was "unsure."

RIVERS observed an unidentified black male (UBM), wearing a gray shirt and jeans, approximately six feet tall, standing outside of a dark colored sedan (appearing to be in bad shape and not uniform in color) waving his hands "erratically" in the air. RIVERS stated that the UBM was about 4-5 feet away from the driver's door of the vehicle and appeared angry and non-compliant. RIVERS did not see anything in the UBM's hands. He did not observe any of the officers outside of their vehicles. RIVERS did not hear anything other than the single "pop."

RIVERS saw the UBM get back into the dark colored sedan and drive eastbound on Mercury Highway in the opposite direction as him. Emergency vehicles pursued and all the vehicles stopped again about 100 yards down the road. At this point, a white truck that was behind RIVERS' vehicle pulled up next to him and the driver told him to leave the area. The white truck was not marked and RIVERS did not know who the driver was. He suspected the driver to be Security Forces and so he left the area. RIVERS did not observe anything that happened 100 yards down the road when the vehicles stopped again.

Investigation on 02/01/2019 at Las Vegas, Nevada, United States (In Person)
File # 415M-LV-3057124Date drafted 02/04/2019by SCHAERRER SEAN DOUGLAS, VOGT BLAKE

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NYE-00122

FD-302a (Rev. 05-08-10)

415M-IV-3057124

Continuation of FD-302 of (U) Interview of Chris Rivers , On 02/01/2019 , Page 2 of 2

RIVERS stated that it was uncommon to see an unidentified vehicle at the NNSS. He believed the incident to have been about 8-10 miles east of the security gate. RIVERS was willing to be contacted by Agents again in the future.

NYE-00123

EXHIBIT B

EXHIBIT B

NEVADA DEPARTMENT OF PUBLIC SAFETY
INVESTIGATION DIVISION
Supplemental Progress Report

CASE NUMBER: 19I000059

NATURE: Officer Involved Shooting

OFFENSE(S): Officer Involved Shooting -

DATE REPORTED: 01/29/2019

DATE ASSIGNED : 01/30/2019

DATE ARRESTED : No Arrest Reported

DATE THIS REPORT: 02/28/2019

ASSIGNED UNIT: Major Crimes South

ASSIGNED INVESTIGATOR: Remmers W R

CURRENT STATUS: Active

JUDICIAL STATUS: Pending Submission Prosecution

W. Remmers IS23
REPORTING OFFICER SIGNATURE

WENDY REMMERS
PRINTED NAME

2/28/19
DATE

J. Jordan IS437
APPROVED BY SIGNATURE

J. Jordan
PRINTED NAME

2-28-19
DATE

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RELEASED TO: _____

RELEASED BY (NDI): _____

Report RE: 19I000059 Case Update - Interview of Witness SPO Tyler Jones

Report Written By: Wendy Remmers, Detective I523

Date Report Written: February 20, 2019

Details:

On February 13, 2019, Nevada Department of Public Safety - Investigation Division (NVDPS-ID) Detective (Det.) Wendy Remmers and Sergeant (Sgt.) Jeff Jourdan conducted an in-person, audio recorded, witness officer interview with SOC, Security Police Officer (SPO) Tyler Jones.

The interview was conducted at the NNSS Security Building 23-1000 Also present for the interview was Charles Leeper - SOC, LLC Corporate Attorney, Steve Wanzer - NSA - Director of Strategic Planning and Program Requirements, Mike Littlejohn - SOC, General Counsel, and Anthony Mendez - SOC General Manager.

Prior to asking SPO Tyler Jones any questions he was informed the interview was in relation to a criminal investigation of the officer involved shooting. SPO Jones was told his cooperation in the interview was voluntary and he was free to stop the questioning. SPO Jones understood and agreed to answer questions.

During the course of the interview, some topics were revisited at various times. For the purpose of continuity, information has been organized by subject matter. Please refer to the recording for complete details. SPO Jones stated the following:

On January 28, 2019, SPO Jones was working at the NNSS. He has been employed at the NNSS for approximately one and half (1 1/2) years. He was working at Station 100, the front gate. At approximately 5:00 PM, Station 100 received a phone call from SPO Gomer; SPO Gomer notified Station 100 that they may be receiving a black car that almost ran him off the road. SPO Gomer gave them the warning of the suspect coming to the gate. SPO Tyler let the other SPOs know that someone was coming up to the gate who was possible DUI.

The SPOs at the gate witnessed a black car coming up to the gate, driving perfectly normal. SPO Jones and other SPOs approached the vehicle. The SPOs at the gate believed he was possible DUI and would have to turn away the vehicle at the gate. When the suspect pulled up at the gate, he was speaking coherently and normally. The suspect was calm and it was believed he actually wanted to find a gas station. Other officers stated they smelt marijuana; however SPO Jones did not smell any. The suspect's dash lights for low fuel were lit up and the suspect stated he needed gas. The suspect was instructed to back up and make a U-turn and to head back towards Indian Springs, due to no gas was available to him at the site.

The suspect backed up his vehicle, stopped, stated "What if I don't" and then

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RELEASED BY (NDI): _____

took off at a high rate of speed through the gate. SPO Jones got on the radio and notified dispatch that a man had "run the gate." He notified the lieutenant and dispatch that the suspect was heading into the site. Two SPOs, Harris and Lau, ran to their vehicle and conducted pursuit of the suspect. The lieutenants also got into their vehicles and conducted pursuit. SPO Jones could not see the vehicles after approximately fifteen (15) seconds.

The interview concluded at 1456.

Evidence:

Item 9C consists of a CD containing an audio recording of an interview with SPO Tyler Jones.

Complete care and custody was completed by Detective Remmers until Item 9C was booked into the Las Vegas Evidence Vault on February 15, 2019, located at 4615 W. Sunset, Las Vegas, NV 89118

Attachments:

N/A

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EXHIBIT C

EXHIBIT C

NEVADA DEPARTMENT OF PUBLIC SAFETY
INVESTIGATION DIVISION
Supplemental Progress Report

CASE NUMBER: 19I000059

NATURE: Officer Involved Shooting

OFFENSE(S): Officer Involved Shooting -

DATE REPORTED: 01/29/2019

DATE ASSIGNED : 01/30/2019

DATE ARRESTED : No Arrest Reported

DATE THIS REPORT: 02/28/2019

ASSIGNED UNIT: Major Crimes South

ASSIGNED INVESTIGATOR: Remmers W R

CURRENT STATUS: Active

JUDICIAL STATUS: Pending Submission Prosecution

WR Remmers 1523
REPORTING OFFICER SIGNATURE

WENDY REMMERS
PRINTED NAME

2/28/19
DATE

J. Jourdan 1437
APPROVED BY SIGNATURE

J. Jourdan
PRINTED NAME

2-28-19
DATE

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RELEASED TO: _____

RELEASED BY (NDI): _____

Report RE: 19I000059 Case Update - Interview of Witness SPO Joseph Thurman

Report Written By: Wendy Remmers, Detective I523

Date Report Written: February 20, 2019

Details:

On February 13, 2019, Nevada Department of Public Safety - Investigation Division (NVDPIS-ID) Detective (Det.) Wendy Remmers and Sergeant (Sgt.) Jeff Jourdan conducted an in-person, audio recorded, witness officer interview with SOC, Security Police Officer (SPO) Joseph Thurman

The interview was conducted at the NNSS Security Building 23-1000. Also present for the interview was Charles Leeper - SOC, LLC Corporate Attorney, Steve Wanzer - NSA - Director of Strategic Planning and Program Requirements, Mike Littlejohn - SOC, General Counsel, and Anthony Mendez - SOC General Manager.

Prior to asking SPO Joseph Thurman any questions he was informed the interview was in relation to a criminal investigation of the officer involved shooting. SPO Thurman was told his cooperation in the interview was voluntary and he was free to stop the questioning or consult with his attorney at any time. SPO Thurman understood and agreed to answer questions.

During the course of the interview, some topics were revisited at various times. For the purpose of continuity, information has been organized by subject matter. Please refer to the recording for complete details. SPO Thurman stated the following:

On January 28, 2019, SPO Thurman was working at Station 100. He has been working for SOC for approximately one and half (1 1/2) years. A phone call was received at Station 100 from SPO Gomer, that a vehicle almost hit him head on and was driving the wrong way on the ramp. The vehicle approached the gate with no headlights going a little fast over the speed bumps. The vehicle presented no badge. The suspect asked the SPOs at the gate where there was a gas station. The suspect was told there is no gas station in the area and was asked if he saw the restricted signs. There was an odor of marijuana emitting from the inside of the vehicle. The suspect was told to back up and turn around. The suspect began to comply and was backing up, however when the suspect got to the speed bump, approximately fifteen (15) feet, the suspect said "what if I don't?" he accelerated and went forward through the gate.

The suspect seemed worried that he would run out of gas, due to his gas light being on. The suspect was communicating and listening to the officers. There were four (4) officers at the gate when the suspect went through. SPO Thurman was in shock that the suspect went through the gate. He reported through dispatch that they had a "gate runner."

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The interview concluded at 2:42 PM.

Evidence:

Item 9B consists of a CD containing an audio recording of an interview with SPO Joseph Thurman.

Complete care and custody was completed by Detective Remmers until Item 9B was booked into the Las Vegas Evidence Vault on February 15, 2019, located at 4615 W. Sunset, Las Vegas, NV 89118

Attachments:

N/A

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EXHIBIT D

EXHIBIT D

JKaka: LT Jordan kinda walked in in a litte bit of a huff so I saw him and I ask him hey whats going on and he said somebody just blew the gate so after a second of disbelief, I kinda hustled out to my car and started up and uh tried finding where this vehicle was

Wynn: were you given a description of the vehicle at all?

JKaka: bare minimum I think uhm the description was a ark Hyundai

Wynn: okay and them uhm, direction of travel?

JKaka: they told me it was northbound on mercury highway. Security was trying to catch up to it.

From 5:25- to 7:25 discussion between wynn and Kakaluvias revolves around what his thoughts were when he hear someone ran the gate, how rare it happens, what reasons a person may have for doing this, what things go on inside the facility that would maybe give someone the intention to trespass. There being nuclear weapons and how he thought maybe graves could have bene after attacking that facility.

JKaka: I passed the second security vehicle that had lights on and that's when I realized I was actually behind the suspect

Wynn: When you asked Central [dispatch] for additional information did you learn anything?

JKaka: I think I asked him uh do you have anything further. Did he have tinted windows , stickers , im not sure exactly what I asked him .. when I passed the lead security thats when I realized there was a dark grey Hyundai in front of me with no lights on.

...

Wynn: do you know about how fast that vehicle was going

JKaka: .. I realized he was doing like 94 and I let Central know that

Discussion about what sort of marks and emergency equipment his vehicle has and same for the security vehicles behind him – standard red and blue lights on side mirrors, grill, and top light bar.

Wynn: sirens on?

JKaka: [pauses] I don't believe so , no.

Wynn: Any description or idea or any information about who had been in that Hyundai?

JKaka: no

Wynn: okay, so then what happens?

JKaka: im just following behind it, at that point my light bar breaks, [chuckles] one of the bars broke and its just sticking up in the air so I actually told, I call him Jordan, LT Jordan to come take point because my equipment broke, per our policy if your equipment isn't 100% you shouldn't be involved or uh pursuing someone. At this point im still point on it so im still chasing and uh pacing

Wynn: okay so in a typically situation out on the 95 , would you have stopped chasing him when your equipment broke?

JKaka: no no I still would have waiting for someone to take point and just taken secondary but there were still lights on that's one of the reasons I still continued.

[Notes after a 'loopy loop' he was pacing 114 when it was a 55 zone]

Im following him and he finally starts to slow down ... finally slowing comes to a stop [draws diagram with Wynn of where JK was in proximity to suspect car] ... I offset like were taught for a felony stop, couple of car lengths back and at that point I open my car door for my A post and I have my rifle out and at the A post I start commanding ya know giving them orders because he just gets out and has his hands behind his back and just stares at me

Wynn: so he just stands next to his car?

JKaka: yeah door open and hes just staring at me

Wynn: Standing up?

JKaka: yep facing me his hands behind his back zombie stare a thousand miles yards away whatever you wanna call it and he's just staring at me and im screaming yelling at him

Wynn: what kinda stuff are you yelling?

JKaka: get yours hands up, lay on the ground, I mean were kinda stuck at that point of what can I really talk to him about? Ya know show me your hands , get your hands up, get on the ground, any of those commands and hes not talking, hes not reacting, hes got no emotion no nothing but I do see at that point all these users coming down [users are people who work at the site, and they are leaving work and exiting the site at this point] [he used the diagram on the table to circle things and describe where] and im challenging him and hes pacing [15:17-15:49 describes him pacing 'around his car'] so I still challenging the guy trying to get him to surrender to uh solve this, staring at me, hands behind his back, and he finally backs up to his car and sits down butt first, so I can never see his hands, [describes him getting back into his car] at this point I shot out his left rear tire. I took one shot and took it out... half a mile around the curve and then he stopped again

17:40 – 20:53 wynn asks him to describe his rifle – does admit he had the personal drum magazine because he 'wanted to show off to his coworkers' wynn asks him why he couldn't just abandon pursuit and let him go and JK's reason was safety of employees leaving and the other nuclear facilities, draws another diagram.

Jkaka: he stops again... I gave him a ton of distance, I stayed way back ... he was out and again was fixated on me staring at me... looked like he was staring right at me... no emotion no reaction no nothing, [22:45- 23:45 describes placement of officers and line of sight] same thing again, show me your hands, get on the ground, ... I was screaming and bellowing at this point... he just starts walking towards me with his hands behind his back, still no expression no emotion... it wasn't like he was walking in the park kicking rocks like he was enjoying himself , I cant tell you how fast he was walking, he wasn't running, he wasn't running at me, [wynn asks him if he had any more info on the person or if he checked the registration on the car and JK says no] ... as I mentioned before I have an empty taser holster because I forgot it at home [instructs LT Jordan to come up to where JK was with his taser] the closer he got, im screaming and yelling, Jordan never showed up... finally he just came close He kept coming closer to me... at this point I was literally afraid that if he took another step I was gunna find out what he had behind his back because he was right by the front of this vehicle and that's when I fired my rounds at him... same time security fired theirs.

Wynn: why did you fire your weapon?

JKaka: because I was afraid that if he took one more step, that he was gunna pull something out from behind his back, and he was gunna try to kill m or him -the security guard next to me and I was afraid at this point.

[wynn asking about any change in demeanor and how many rounds were fired – JK remembers firing two and security guard one. How the suspect reacted to getting hit, cuffed him, and rendered first aid. JK was asking the suspect, as he lay there, why did you this/dying declaration – never responded. Jk talks about how 2 other officers started yelling at car show me your hands so he thought there was second person. They were challenging an empty car. Jordan holding pressure on his wound, JK checked his pulse, started CPR, did call for medics after shots fired. Goes on about after the shots fired]

Wynn: did you see anything around him?

Jkaka: yes, it was a quick glance, I remember just catching out the corner of my eye, behind him I saw a pair of brass knuckles... when he got hit he fell forward... somehow rolled onto his back because I had to roll him over to put the cuffs on him,... somewhere behind him were brass knuckles on the ground. [describes his injuries. Had anxiety attack over it. JK called 911. Only did a waistband search. Immediate concern to render first aid. Confirms he felt there was an imminent threat. And believed he had a weapon behind his back. Describes hearing other officer shot as well and how he came to that conclusion. Did not know other officer who was next to him in the car doorway. Describes him as Hispanic or light skinned.]

Female interviewer possibly Wendy: did the other security officer say anything before you guys shot?

Jkaka: yes he did, he said something along the lines of, 'I have the shot im taking the shot.' Or something to that affect. But I think he was saying 'I have the shot' and I remember at the time thinking well im not gunna tell him to shoot... I never replied to it I just ignored it. [reconfirms he was screaming verbal commands at him and again reconfirms how he felt as suspect was getting closer and how he got chills and pictured his wife and that's why he felt such fear about dying and that's when he took his rifle off safe]

EXHIBIT E

EXHIBIT E

DECLARATION OF PAUL S. PADDA

I, Paul S. Padda, do hereby declare the following based upon my personal knowledge:

1. I am above the age of eighteen and competent to testify to the matters set forth herein. I am not a party to this lawsuit. Rather, I am counsel of record for Plaintiffs in this matter styled Estate of Nekiyo Dewayne Graves, et. al. vs. Nye County, Nevada, et. al., United States District Court (D. Nev.), Case No. 2:20-cv-2359-JAD-DJA.

2. I am submitting this Declaration in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss. ECF No. 54.

3. The document attached in support of Plaintiffs' Opposition as Exhibit A is a true and correct copy of a transcription of an interview with Defendant John Kakavulias. That interview was provided to Plaintiffs in audio format as part of Defendants' Federal Rule of Civil Procedure 16.1 disclosure requirements. The other documents, Exhibits B, C and D, are also true and correct copies of documents provided by Defendants to Plaintiffs as part of their disclosure requirements.

4. I declare under penalty of perjury that the foregoing is true and correct.


Paul S. Padda

Dated: February 11, 2022